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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Definition of an Over-the-Air Signal of )  
Grade B Intensity for Purposes of the )  
Satellite Home Viewer Act )

To: The Commission )

RM - 9335

**COMMENTS OF PRIMETIME 24 JOINT VENTURE IN SUPPORT OF  
EMERGENCY PETITION FOR RULEMAKING OF NATIONAL RURAL  
TELECOMMUNICATIONS COOPERATIVE**

PrimeTime 24 Joint Venture ("PrimeTime 24") hereby submits its comments in support of the Emergency Petition for Rulemaking filed with the Federal Communications Commission (the "Commission" or "FCC") by the National Rural Telecommunications Cooperative ("NRTC") on July 8, 1998 (the "NRTC Petition").<sup>1</sup> As is discussed more fully below, PrimeTime 24 submits that the public interest in fostering competition through the development of satellite television as a viable alternative to cable television, and the interests of the hundreds of thousands of satellite subscribers whose access to network programming via satellite has been jeopardized by recent court rulings, require the Commission to expeditiously commence a rulemaking proceeding regarding the definition of an "over-the-air signal of grade B intensity" for purposes of identifying "unserved households" under the Satellite Home Viewer Act, 17 U.S.C. § 119 ("SHVA").

**I. INTRODUCTION**

The NRTC petition demonstrates that serious difficulties in the application of the

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<sup>1</sup> PrimeTime 24 also supports the petition for declaratory ruling and/or rulemaking of Echostar Communications Corp., which fundamentally raises the same issues as those raised by the NRTC Petition. PrimeTime 24 intends to file comments supporting the Echostar petition on or before September 11, 1998.

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Commission's "Grade B" standard in the context of SHVA could deprive millions of consumers of a meaningful choice between receiving cable and satellite-delivered programming and deprive rural consumers not reached by cable of any access to network programming. These difficulties have reached a crisis as a result of two courts' interpretations of the "unserved household" restriction contained in SHVA.

The uncertainty surrounding the retransmission of network signals via satellite prevents true competition in the multichannel video programming market. As a result of SHVA's ambiguous restrictions, which have now been given an anticompetitive interpretation, millions of consumers may soon be erroneously classified as being "served" under SHVA and therefore prevented from receiving programming of their choice. The resulting customer confusion and anger stemming from such classifications will undoubtedly drive potential satellite subscribers to cable service, thereby thwarting the Commission's goal of reducing cable rates by fostering competition in the video services marketplace.

Moreover, hundreds of thousands of rural consumers are not served by cable and depend entirely on satellite delivery for their network programming. Their access to network programming, and the Commission's goal of providing television service, as far as possible, to all people of the United States, is also threatened.

The United States Copyright Office conducted hearings last year and issued a comprehensive report on the so-called "white area" dispute arising under SHVA, concluding, with considerable understatement, that "[o]peration of the unserved household restriction, particularly the transitional signal intensity measurement provisions, has been problematic." U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast

Signals at 108 (August 1, 1997)("Copyright Office Report"); *see id.* at 128 ("current Grade B standard is not without its problems"). Ultimately, the Copyright Office questioned whether SHVA could be drafted so as "to permit workable, individual determination of subscriber eligibility for network service." *Id.* Given the current regulatory void, courts have been forced to fill in the gaps in the statute, without having the proper institutional expertise. This has exacerbated the problems identified by the Copyright Office.

The recent court cases involving SHVA have only served to highlight the problematic nature of the Grade B standard when it is transplanted from its original regulatory context -- television station assignments -- and applied to determinations of individual household eligibility under SHVA. Testimony from broadcast engineering experts in those cases (including the experts hired by the broadcasters), excerpts of which are attached to as exhibits to these comments, demonstrates the serious deficiencies in the current standard as the broadcast industry and two federal courts would apply it with respect to SHVA. Those deficiencies include at least the following:

- Although Congress made receipt of "an over-the air signal of Grade B intensity (as defined by the Federal Communications Commission)" through use of a "conventional outdoor rooftop receiving antenna" the touchstone for SHVA eligibility, the Commission has never defined such a signal for purposes of individual household eligibility determinations under SHVA.
- Even assuming (as two courts now have) that "an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)" should be equated with the field strengths associated with the Grade B contours as set forth in 47 C.F.R. § 73.683, Congress has not specified how many hours per day a consumer must receive such a signal to be ineligible for satellite delivery of network programming.
- Even if it were known how many hours per day such a signal had to be received, Congress specifically declined to establish any measurement methodology for

determining the presence or absence of such a signal.

- The Commission's procedures for "Field strength measurements" set forth in 47 CFR §73.686 – which Congress chose not to adopt for purposes of individual household eligibility determinations under SHVA – are not well suited to such determinations, among other reasons because they contemplate measurements uniformly at 30 feet in the air, whereas many households' antennas are situated much lower; they contemplate testing across 100 foot runs in roads, not at the particular household to be tested; they make unrealistic assumptions about the orientation of households' antennas; and they contemplate the use of median measurements, which obscure the potentially extreme variability of the measurements and present an inherently misleading picture of receiving conditions at particular households.
- The broadcasters' use of the so-called Longley-Rice model to predict which individual households will receive "an over-the-air signal of Grade B intensity," which one court preliminarily has accepted, is fundamentally flawed, since the broadcasters have selected input parameters for the model (50% location variability, 50% time variability, 50% statistical confidence level, and a 30 foot antenna) that greatly exaggerate the broadcast stations' predicted coverage areas, ignore the impact of buildings and vegetation on signal propagation, and in any event do no more than suggest a percentage likelihood that a household within a predicated area will receive an over-the-air signal of Grade B intensity.
- The Longley-Rice model can be programmed with input parameters (higher probabilities and lower antenna height) that err on the side of consumers, instead of the broadcasters, and which produce much smaller predicted coverage areas with a much higher level of confidence.

## **II. BACKGROUND**

### **A. PrimeTime 24**

PrimeTime 24 is the leading provider of network television programming to the direct-to-home ("DTH") market and the only such provider not owned or controlled by cable television interests. PrimeTime 24 uplinks programming directly to consumers or through distributors of DTH satellite programming. PrimeTime 24 and its distributors transmit the broadcasts of NBC, ABC, and CBS pursuant to a compulsory copyright license, and a national

"FoxNet" feed pursuant to a license agreement, and pay a statutorily (or in the case of Fox, contractually) determined royalty fee to retransmit network television programming to satellite subscribers in unserved households as defined by SHVA.

**B. The NRTC Petition**

The NRTC Petition requests that the Commission institute a rulemaking proceeding to adopt a definition of "Grade B" tailored to the purposes of the "unserved household" definition contained in the SHVA. The definition suggested by the NRTC for "Grade B" with respect to the SHVA provisions would be a contour encompassing a geographic area in which 100 percent of the population, using readily available, affordable equipment, receives over-the-air coverage by network affiliates 100 percent of the time. This definition would provide that only those consumers that in fact receive local network signals over-the-air would be prevented from receiving distant network signals by satellite. Because the broadcasters' profound misapplication of the "Grade B" standard has now formed the basis for a preliminary injunction prohibiting satellite reception of network signals by rural subscribers across the country, the NRTC requested that the Commission act on its rulemaking petition on an expedited basis.

**C. The Lawsuits Against PrimeTime 24**

The National Association of Broadcasters ("NAB"), the four networks, and the affiliate associations of the four networks have jointly funded three lawsuits as part of their litigation campaign against PrimeTime 24: CBS, Inc., et al. v. PrimeTime 24 Joint Venture, Civil Action No. 96-3650-CIV-NESBITT (S.D. Fla.) ("the Miami case"); Cannan Communications, Inc. v. PrimeTime 24, No. 2-96-CV-086 (N.D. Tex.) ("the Amarillo case"); and ABC, Inc. v. PrimeTime 24 Joint Venture, C.A. No. 1:97 CV 00090 (M.D. N. Carolina) ("the Raleigh Durham case"). The

Amarillo case, which is limited to the Amarillo market, was brought in March of 1996 by a single NBC affiliate. An ABC owned-and-operated station brought the Raleigh Durham case (limited to that market) in February, 1997. The Miami case is nationwide in scope and was brought in December 1996 by CBS, Fox, several CBS affiliates, and the CBS television affiliates association.

On July 10, 1998, two days after NRTC filed its Emergency Petition, the United States District Court for the Southern District of Florida issued a preliminary injunction in the Miami case.<sup>2</sup> This preliminary injunction presumptively prohibits PrimeTime 24 and its distributors from providing CBS and Fox network programming to any customer "within an area shown on Longley-Rice propagation maps, created using Longley-Rice Version 1.2.2 in the manner specified by the Federal Communications Commission . . . , as receiving a signal of at least a grade B intensity of a CBS or Fox primary network station." According to the Court, Longley Rice Version 1.2.2 "specified by the Federal Communications Commission" is one that predicts signal strength at 30 feet with input parameters of 50% time variability, 50% location variability, and 50% confidence.<sup>3</sup> This injunction presumptively bars the retransmission of network signals by satellite to any new subscribers that are located within the specified Longley-Rice predicted Grade B contour of a local CBS or Fox network affiliate and requires all subscribers in such contours activated by PrimeTime 24 on or after March 11, 1997 to be disconnected within 90 days of the

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<sup>2</sup> CBS, Inc. et al. v. PrimeTime 24 Joint Venture, Supplemental Order Granting Plaintiff's Motion for Preliminary Injunction, Civil Action No. 96-3650-CIV-NESBITT (S.D. Fla. July 10, 1998).

<sup>3</sup> Of course, the Commission has never adopted the Longley Rice model for purposes of individual household eligibility determinations under SHVA.

court's order.<sup>4</sup>

To be sure, the preliminary injunction permits subscribers located within a station's Longley Rice predicted grade B contour to receive network service via satellite if a signal intensity test purportedly based on the Commission's field strength methodology (see Rule 73.686) shows the subscriber to receive less than a grade B intensity signal, or if the local affiliate(s) grant a waiver. However, as the Copyright Office noted, signal intensity tests are too expensive to be economically feasible. See Copyright Office Report at 123. Thus, as a practical matter, the Longley Rice model will in almost all instances be the conclusive determinant of subscriber eligibility. Furthermore, as set forth herein, there are serious technical problems with importing the Commission's existing field strength testing methodology (geared to area measurements) for purposes of individual SHVA household signal strength measurements.

As a direct result of the Miami court's injunction, therefore, over one million satellite subscribers throughout the United States face imminent termination of their network services. This injunction has therefore caused a crisis for consumers across the country and in the satellite industry. Moreover, if the court enters a permanent injunction, then PrimeTime 24 may be required to terminate hundreds of thousands of additional subscribers because the permanent injunction requested by the plaintiffs is not limited to subscribers that signed up after March 11, 1997, and the Longley-Rice maps endorsed by the Miami court show very few areas in the United

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<sup>4</sup> The plaintiffs have "unilaterally stipulated" not to enforce the preliminary injunction's retroactive relief for an additional 90 days, apparently hoping to forestall pre-election SHVA-related legislation that might not be favorable to their interests. Even if the turn off date is extended by a few months, however, this will merely delay the consumer harm that will result from the injunction. If the Commission acts before the turn off date, much of this harm may be avoided.

States that are not covered by some CBS (or Fox) predicted Grade B contour. A trial on the plaintiffs' request for a permanent injunction was held in mid-August; the parties are now in the process of submitting post-trial papers.<sup>5</sup>

As a result of the recent litigation, it is important that the Commission institute the rulemaking proceeding urged by the NRTC Petition and do so forthwith because, under SHVA, the Commission is responsible for defining the meaning of "an over-the-air signal of grade B intensity," which is necessary to further the competitive goals of the statute. The Commission, however, has never defined this standard for purposes of SHVA, and the entrenched broadcast industry's partisan attempts to apply the Commission's four-decade old definitions, developed for different purposes, to determine SHVA eligibility, and its misapplication of the Longley-Rice model, are on the verge of producing disastrous results.

### **III. THE PUBLIC INTEREST WILL BE SERVED BY THE ISSUANCE OF A NPRM CONSIDERING THE ADOPTION OF A DEFINITION OF "SIGNAL OF GRADE B INTENSITY" FOR SHVA PURPOSES**

The issuance of a Notice of Proposed Rulemaking to consider the adoption of a definition, for SHVA purposes, of the term "over-the-air signal of grade B intensity" through the "use of a conventional outdoor rooftop receiving antenna" will lend certainty to a highly confusing situation and serve the public interest because resolution of the definition of this portion of the SHVA will

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<sup>5</sup> In the Raleigh Durham case, an ABC owned and operated station has been granted summary judgment and obtained a permanent injunction requiring PrimeTime 24 to disconnect its ABC services from all subscribers located within the station's FCC predicted grade B contour. This means that many subscribers that satisfy the Miami court's test -- and have a measured median field strength of less than the grade B value -- will not have any access to the ABC network (unless they can subscribe to cable). In the Amarillo case, an NBC affiliate is seeking relief similar to that obtained by ABC. The Amarillo case was tried in November 1997 and remains under advisement by the court.

promote competition and ensure universal access to network television. Not only does the Commission possess unique regulatory expertise with respect to the technical term that is at the root of the current interpretive crisis ("over-the-air signal of grade B intensity"), as Congress has recognized, but Commission clarification of the Grade B signal standard with respect to the SHVA will further the Commission's goal of promoting competition in the video services marketplace and ensure that all Americans will have access to quality reception of network programming. Accordingly, Commission action on this issue would be in the public interest, because it will promote the long-awaited development of satellite television as a viable competitor to cable television.<sup>6</sup>

**IV. THE RECENT LITIGATION INVOLVING SHVA HAS DEMONSTRATED THE SERIOUS DEFICIENCIES IN THE GRADE B SIGNAL STANDARD AS APPLIED TO THE SATELLITE HOME VIEWER ACT**

For a variety of reasons -- weak signals, terrain, and interference caused by buildings, bounced signals, nearby stations, power lines, vegetation, and other sources -- many consumers cannot receive network television programming of viewable quality through the use of a conventional rooftop antenna. Satellite, on the other hand, can deliver a high-quality picture anywhere in the continental United States, and in recent years, millions of eligible consumers have chosen to receive network programming via satellite. Recent decisions by the federal courts interpreting SHVA's definition of an "unserved household" and imposing predictive models and testing methodologies designed for other purposes threatens the delivery of network

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<sup>6</sup> The Commission has ample authority to adopt the proposed rule, as set forth in the Reply of the National Rural Telecommunications Cooperative to Preliminary Response of the National Association of Broadcasters and the Petition for Declaratory Ruling and/or Rulemaking of EchoStar Communications Corp.

programming to the great many consumers who today only have access to network programming because of satellite technology.

Under SHVA, an "unserved household" is one that (among other things), "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with the network."<sup>7</sup> In the absence of Commission guidance, the courts have so far held that the Commission has defined "an over-the-air signal of Grade B intensity" as the decibel levels set forth in Section 73.683(a) of its rules. However, this standard is itself ambiguous, unworkable and, as applied by the courts, anticompetitive.<sup>8</sup>

The evidence in the various SHVA cases -- including the testimony of the broadcast industry's engineering experts, Robert du Treil, Jr. and Jules Cohen, and PrimeTime 24's engineering experts, Richard Biby and William Hassinger -- has adduced the following information that demonstrates the deficiencies of this standard as construed by the courts:

- The "grade B" values set forth in the Commission's Rule 73.683(a) were never intended to be used in determining whether a particular household receives adequate over the air reception. Rather, they were established for the allocation of television broadcast channels in the early 1950's, when television was in its infancy. See testimony of Richard Biby (Exhibit D) and Declaration of William Hassinger (Exhibit E).
- The "grade B" values set forth in the Commission's rules for the allocation of television stations are based on a criterion of area service that is simply inadequate

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<sup>7</sup> 17 U.S.C. § 119(d)(10).

<sup>8</sup> PrimeTime 24 maintains that it was the intent of Congress to make satellite service available to those households which could not receive a picture of acceptable quality. "Grade B intensity" necessarily incorporates the concept of picture quality to make sense in the entire context of the statute. PrimeTime 24 has urged Congress and the Copyright Office to clarify the standard for unserved household to make explicit its reliance on picture quality.

for determinations of individual household eligibility under SHVA. Id.

The "grade B" standard sought to ensure an acceptable picture to the median observer, 90% of the time, at the best 50% of receiving locations. This means that a grade B signal was intended to provide a picture that would be deemed unacceptable to half the viewers (of black and white television sets) in the 1950s; that even those who deemed the picture acceptable would not get it at 50% of the locations; and even those who deemed it acceptable and were in the 50% of the locations that received it would not get it 10% of the time, i.e. 2.4 hours per day. See id.; testimony of Jules Cohen (Exhibit B).

- Many of the assumptions in the planning factors used by the Commission to determine a "Grade B" signal in the early 1950's are outmoded or inapplicable, including the assumption that grade B service would apply only to areas where there was no man-made noise. See testimony of Richard Biby (Exhibit D) and Declaration of William Hassinger (Exhibit E).
- The "grade B" values set forth in the Commission's rules do not take into account many factors that may degrade a picture even of high signal strength, including interference from other television stations, multipath interference, or other kinds of interference. Id.
- The "grade B" values set forth in the Commission's Rule 73.683(a) refer to ambient median field strengths and have nothing to do with a "conventional rooftop antenna" or actual reception of a signal by a household.

As the NAB's expert, Robert du Treil, Jr., testified, "the law makes mention of a conventional rooftop antenna. But ... as far as the availability of a Grade B signal, we speak to ... whether there is an ambient Grade B signal in the area.... The antenna itself really is irrelevant to that particular question." See Exhibit A (Tr. 459); see also id. at 460 (states that he doesn't understand the relevance of a conventional rooftop antenna); id. at 527 (antenna irrelevant to field strength).

- Even if Congress believed that the "grade B" values set forth in the Commission's Rule 73.686(a) were the appropriate standard, Congress did not indicate how many hours a day that a household must receive less than a "grade B" signal in order to qualify as an unserved household. A median grade B signal means, of course, that the signal will be less than the grade B value 50% of the time. See testimony of Jules Cohen, Exhibit B, at 272 (stating that "I'm sure" that it is correct that there is no place in the statute that says how many hours a day it is necessary to get a grade B signal).
- Congress did not specify any methodology of measuring the signal strength of a

household. See testimony of Robert du Treil, Jr. at 532 (Exhibit A). It could have adapted the procedures set forth in Rule 73.686, which were extant when SHVA was enacted and later amended, but chose not to. The methodology adopted by the court in the Miami case, which purports to rely on Rule 73.686, is flawed for measuring household signal strength among other reasons because it:

- (a) measures signal strength at 30 feet rather than the height of a conventional rooftop antenna, as specified in SHVA;
- (b) assumes an antenna oriented for maximum gain for the particular station, even though many households must adopt a compromise orientation to receive several stations located in different directions; and
- (c) measures signal strength along a nearby road, rather than at the household.

See testimony of Richard Biby (Exhibit D) and Declaration of William Hassinger (Exhibit E); see also testimony of Jules Cohen (Exhibit C) (acknowledging that as one goes down from 30 feet toward the ground signal strength generally decreases, although there is no simple way to calculate the decrease); testimony of Robert du Treil, Jr. (Exhibit A) ("As a general matter, as an antenna is increased in height above ground, the signal ... will be higher.").

Prior to the litigation against PrimeTime 24, the broadcast industry had sponsored a different testing methodology that was not based on Rule 73.686 in that, among other things, it measured signal strength in relation to actual rooftop height, rather than arbitrarily at 30 feet. It also sought to measure signal strength as close to the house as possible, rather than along a 100 foot mobile run at an unspecified distance from the household on a nearby road. See testimony of Robert du Treil, Jr. and D. Ex. 76 (Exhibit A) and testimony of Jules Cohen and Def. Ex. 649 (Exhibit B). It is noteworthy that even the broadcast industry's principal expert readily has conceded that signal strength varies greatly over short distances.

- The testing done by the broadcast plaintiffs in the Miami case illustrates the problems with their methodology, even assuming that measurements at 30 feet were appropriate. In Pittsburgh, for example, they found that only 40% of the households purportedly measured received a *median* signal strength of less than grade B. Yet, at 70% of those measurement sites, the *minimum* signal level was less than grade B. See testimony of Jules Cohen at Tr. 360-364 and Pl. Exs. 343, 344 (Exhibit B).
- Congress did not specify any methodology for predicting the signal strength at any given household. The Longley Rice methodology using the parameters advocated by the broadcast industry plaintiffs and adopted by the Miami court as the

"presumptive" basis for determining eligibility under SHVA is inappropriate for this purpose, among other reasons because:

- (a) The 30 foot antenna-height parameter is inconsistent with the statutory requirement that signal must be received through a conventional rooftop antenna. Conventional rooftop antennas are often not at 30 feet.
- (b) The 50% time-variability parameter is too low.
- (c) The 50% location-variability parameter is too low, particularly given the wide variability of signals over short distances and the relatively large size of the cells used in applying the Longley Rice methodology.
- (d) The 50% statistical confidence factor is far too low; statisticians typically use a 95% confidence factor.
- (e) The Longley Rice model does not take into account morphology -- vegetation and buildings -- which can significantly degrade a signal.

See testimony and affidavit of Richard L. Biby (Exhibit D).

A comparison of Longley Rice maps for the Washington, D.C. area using the parameters prescribed by the Miami court and maps using more reasonable parameters, and taking morphology into account, shows a dramatic difference in the area predicted to receive a "grade B" signal. See maps attached to affidavit of Richard L. Biby (Exhibit D).

The FCC, as the agency with expertise in assessing these technical matters of broadcast television, with responsibility for ensuring competition in the multichannel video programming market and access to television service, and with the statutory duty and authority to define the term "grade B intensity signal" for purposes of SHVA, must act now to impose order on the chaos caused by the recent court decisions. Experience has taught that Congress' reference in SHVA to an "over-the-air signal of grade B intensity" through the "use of a conventional outdoor rooftop receiving antenna" raises far more questions than it answers. The Commission should therefore immediately institute a rulemaking proceeding to fill the gaps and resolve the

ambiguities left by Congress in its definition of an "unserved household."

## V. CONCLUSION

This is, at its core, a consumer issue. Eligible consumers want to receive network programming via satellite. The ability of DTH program distributors to provide network programming is critical to their continued competitiveness with cable in the video marketplace. The misuse and misapplication of the Commission's existing regulations and the Longley Rice model by the broadcast industry is now preventing the delivery of network programming by satellite and blunting the developing satellite industry's competitive thrust. Accordingly, the rulemaking proceeding requested by the NRTC Petition is critical to resolve the fundamental problems inherent in SHVA and to protect the interests of millions of television viewing households across the country.

Respectfully submitted,

PRIMETIME 24 JOINT VENTURE

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Dated: September 4, 1998



## **EXHIBIT A**

Excerpts from the transcript and exhibits from the trial testimony of Louis Robert du Treil, Jr.,  
Cannan Communications, Inc. v. PrimeTime 24, No. 2-96-CV-086 (N.D. Tex.).

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

CANNAM COMMUNICATIONS, INC.,

Plaintiff,

VS

NO. 2:96-CV-086

PRIMETIME 24 JOINT VENTURE,

Defendant,

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CIVIL NONJURY TRIAL

took place on November 12, 13, 14, 17, 18, 19, 20, and 21,  
1997, at the United States Courthouse, Amarillo, Texas, before  
The Honorable Mary Lou Robinson, United States District Judge  
for the Northern District of Texas, presiding.

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1 we will address them.

2 MR. TREANOR: Thank you, Your Honor.

3 Would you like me to begin the voir dire of the  
4 witness now?

5 THE COURT: Well, let's get copies. I think  
6 that will --

7 MR. RINEY: I stand corrected, Your Honor.  
8 Your Honor, if I could --

9 THE COURT: Well, why don't we just -- We  
10 may reach the break before we get to it anyway. So we  
11 will just go ahead and then we will see what happens.

12 MR. TREANOR: I apologize Your Honor.

13 LOUIS ROBERT du TREIL, JR.,

14 called as a witness in behalf of the Plaintiff, being duly  
15 sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. TREANOR:

18 Q. Mr. du Treil, would you state your full name and  
19 your business address, please?

20 A. Louis Robert du Treil, Jr., at du Treil, Lundin  
21 & Rackley, Inc., 240 North Washington Boulevard, Sarasota,  
22 Florida 34236.

23 Q. Now, would you describe your profession, sir,  
24 your occupation?

25 A. I am broadcast consulting engineer.

1 at this; but I think the point is moot at this stage.

2 MR. TREANOR: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. SCHWARTZ:

5 Q. Good afternoon, Mr. du Treil.

6 A. Good afternoon.

7 Q. You were hired in this case by the Dow, Lohnes firm  
8 from Washington, D.C., correct?

9 A. Correct.

10 Q. And Dow, Lohnes has been paying your bills in this  
11 case. Is that correct?

12 A. As I understand it, yes.

13 Q. Is there some confusion in your mind about who is  
14 paying you?

15 A. I don't get the bills my -- I don't see the  
16 payments myself. They go to the billing department.

17 Q. To the best of my knowledge, Dow, Lohnes has been  
18 paying those bills?

19 A. As I understand it.

20 Q. And Dow, Lohnes represents the NBC Affiliates  
21 Association, correct?

22 A. I don't purport to know that.

23 Q. You were here in the courtroom when Mr. Dunaway  
24 testified to that effect. Is that correct?

25 A. I was.

1 employed in this case, you specifically fashioned it, to use  
2 your words, "in light of as SHVA's focus on the availability  
3 of a Grade B signal at a particular household." Is that  
4 right?

5 A. Yes, I understand that.

6 Q. So the issue, as you understand it, under the  
7 Satellite Home Viewer Act, isn't whether a subscriber is  
8 located in an area or within a contour, where the FCC or  
9 Longley-Rice, or anyone else, has predicted that a certain  
10 percentage of households will get a signal of a certain  
11 intensity a certain percentage of the time? That is not the  
12 issue, correct?

13 A. I guess the question -- As I understand it, the  
14 issue is whether the particular household receives a Grade B  
15 signal.

16 Q. And that is through the use of a conventional  
17 rooftop antenna, correct?

18 A. Well, the -- I understand that the -- that the law  
19 makes mention of a conventional rooftop antenna. But, you  
20 know, as far as the availability of a Grade B signal, we speak  
21 to, you know, whether there is an ambient Grade B signal in  
22 the area. The fact that -- The antenna itself really is  
23 irrelevant to that particular question.

24 Q. Now, the statute, based on your review of it,  
25 doesn't use the word "ambient signal," does it, the words?

1           A.    No.

2           Q.    And the words "conventional out top roof" -- I am  
3   sorry-- "outdoor rooftop antenna" do appear on the face of the  
4   statute. That much and you are aware of?

5           A.    Yes, yes.

6           Q.    And are you saying that notwithstanding that  
7   language, from your standpoint, the conventional outdoor  
8   rooftop antenna language in the statute is irrelevant?

9           A.    The only -- the only way that I can interpret --  
10   interpret that statute is to -- is according to the  
11   information that is available through me -- to me through FCC  
12   definitions in what a Grade B is. And so I have -- I have to  
13   use my understanding and apply it to that statute.

14          Q.    And in your understanding, the conventional outdoor  
15   rooftop antenna language is irrelevant, is that the case?

16          A.    Well, I don't -- I don't know what that means,  
17   except that it may refer to, perhaps, a 30-foot height above  
18   ground. I mean, it is -- I know what a Grade B -- what an FCC  
19   Grade B contour signal is, and that is what I would -- would,  
20   you know, assume was meant there.

21          Q.    And by the same token, you don't know what a  
22   conventional outdoor rooftop antenna is?

23          A.    Certainly I know what a conventional outdoor  
24   rooftop antenna might be; but, I don't understand its  
25   relevance.

1 of television viewing households will get a signal of Grade B  
2 intensity 50 percent of the time. Is that right?

3 A. Yeah, at the outer -- at the outer boundary of the  
4 Grade B contour a-- you know, in the case of KAMR, a 47 dbu  
5 signal will be present at 50 percent of the locations for 50  
6 percent of the time, according to the prediction model, yes.

7 Q. Assuming the prediction is correct; is that right?

8 A. It is a prediction model. It is the FCC's  
9 prediction model.

10 Q. And as you, yourself, have recognized, based on  
11 your experience, the reality in the field does not always  
12 comport with the model, correct?

13 A. Yes, I think that -- I mean, it is true that the  
14 signal does -- can deviate substantially from the prediction,  
15 yes.

16 Q. And focusing again on the prediction, just assuming  
17 it is correct, if 50 percent of the households are capable of  
18 the outer boundary of the Grade B contour of getting a Grade B  
19 signal 50 percent of the time, then by definition, conversely  
20 there are 50 percent of the households, along the periphery  
21 at least, who can't get a Grade B signal. Is that right,  
22 according to the model?

23 A. Yeah, that certainly is the case. Because the  
24 prediction -- according to the general prediction model,  
25 coverage is -- progresses in a log normal fashion. So, we use

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1 document is clearly within the concept of a document offered  
2 in compromise. I don't believe the Rule is restricted to  
3 just a particular case after it is filed. This problem is  
4 part of a larger problem, as Your Honor has been informed by  
5 Prime Time 24's counsel. And this is a small piece in the  
6 negotiations which have not been successful in attempting to  
7 resolve that larger problem. Thank you.

8 THE COURT: All right. You may proceed. I will  
9 permit examination concerning the document.

10 MR. SCHWARTZ: Thank you, Your Honor.

11 BY MR. SCHWARTZ:

12 Q. Do you have in front of you now Defendant's Trial  
13 Exhibit 76, Mr. du Treil?

14 A. I believe so. It is identified as Exhibit 187?

15 Q. That is a Deposition exhibit number. But at the  
16 top -- and I can understand your confusion; I apologize for  
17 that. But the document reads, "Satellite Home Viewer Act TV  
18 Signal Measurement Methodology." Is that correct?

19 A. Yes.

20 Q. And up in the upper right-hand corner dated  
21 February 27, 1996?

22 A. Yes.

23 Q. And it is on the letterhead of du Treil, Lundin and  
24 Rackley, Inc. Is that right?

25 A. Correct.

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1 Q. That is your firm?

2 A. Yes.

3 Q. Now, you are familiar with this document, you have  
4 seen it before?

5 A. I have seen it.

6 Q. And is it your understanding that this is a set of  
7 signal measurement procedures that your firm authored?

8 A. Yes.

9 Q. And directing your attention to the first sentence  
10 listed on the background, which reads, quote, "While  
11 measuring a television station's field strength may initially  
12 appear to be elementary, the effect of multi path or signal  
13 reflections must be considered," end quote. Do you see that?

14 A. Yes.

15 Q. Do you agree with that statement?

16 A. Yes.

17 Q. And I would like to direct your attention to Page 2  
18 of this exhibit. And the first full sentence states that,  
19 "The field strength measurement procedure to be used" --  
20 Which I understand it to mean the one proposed in this  
21 document, correct?

22 A. Yes.

23 Q. I am going to continue reading -- "is similar to  
24 the quote 'cluster,' end quote, procedure outlined in Section  
25 73.686 B 2 VIII of the FCC rules." Have I read that

500-15

1 correctly?

2 A. Yes.

3 Q. And you did not employ a cluster procedure in this  
4 particular case that is now at trial, did you?

5 A. No.

6 Q. And let's direct your attention, if we might, to  
7 the first bullet point listed under required test equipment.  
8 And do you see the introductory sentence says, "The following  
9 equipment is recommended for the measurement procedure"?

10 A. Yes.

11 Q. And the first bullet reads, "Vehicle with a  
12 telescoping mast or some other means of elevating the  
13 receiver antenna to five feet above the highest point of the  
14 home's rooftop level." Do you see that?

15 A. Yes.

16 Q. And then it goes on to say, "If the roof height is  
17 beyond the maximum height of the mast, elevation of the  
18 antenna to 30 feet above the ground level is acceptable." Do  
19 you see that?

20 A. Yes.

21 Q. So am I interpreting this correctly to say that the  
22 testing is to take place at some point five feet above the  
23 highest point of the particular household's rooftop level, is  
24 that what is being proposed here?

25 A. Apparently.